

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 1087 of 1997

For Approval and Signature:

Hon'ble MR.JUSTICE KUNDAN SINGH

- =====
1. Whether Reporters of Local Papers may be allowed : YES
to see the judgements? Yes.
 2. To be referred to the Reporter or not? - :
 3. Whether Their Lordships wish to see the fair copy : NO
of the judgement? -
 4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder? -
 5. Whether it is to be circulated to the Civil Judge? : NO
-

RUXMANIBEN G BHATT -DECD.THRO'HEIRS

Versus

SUSHILABEN VINODCHANDRA PAREKHDECD.THRO'HEIRS

Appearance:

MR MB GANDHI FOR MR HR LATHIGARA for Petitioners
MR NK MAJMUDAR for Respondents.

CORAM : MR.JUSTICE KUNDAN SINGH

Date of decision: 30/03/2000

ORAL JUDGEMENT

#. The respondent- plaintiff filed H.R.P. Suit
No.16 of 1987 for arrears of rent and possession of the
suit premises and also for possession of the rooms
situated on the first floor of the suit property. The
plaintiff purchased the suit property on 15-3-1985 from
one trust and he is the owner of Survey No.5874, 5874/1

and M.C. No. 3578, 3578/1 in Shahpur ward, Ahmedabad.

#. According to the case of the plaintiff's case, the husband of the defendant no. 1 Chunilal Ganpatlal Bhatt was given two rooms situated on the ground floor of Survey No. 5874 and 3578 at the rate of Rs.25/- p.m. on rent and thus he was tenant of the suit premises of the ownership of the plaintiffs and all the municipal tax and education cess and electricity bill are to be born out by the tenants. Tenancy begins from first date of every English calendar month and ends on the last date of the said month. The plaintiffs also informed the defendant no.1 by the letter that the above suit property has been purchased by the plaintiffs but the said letter was returned with the endorsement "not known". The defendant no.1 is not residing in the suit premises after death of her husband and is not using the suit premises. But actually she is even not residing in Ahmedabad as her two sons are settled and residing at Bombay and Vapi and they are doing service and business there and the defendant no. 1 also used to stay some time at Bombay and Vapi with her sons. The defendant is not in need of the suit property. The defendants have also taken over the possession of the one room situated on the first floor of the suit premises. The defendant no. 1 has not paid any rent of the suit premises to the plaintiff since that property is purchased by the plaintiff and has not paid municipal tax of Rs.2000/- since last seven years. Thus, the defendant no.1 has become tenant in arrears of rent of Rs.537-50 and the amount of Rs.537-50 is due to the plaintiff from the defendant no.1 for 21 months and 15 days for the period from 15-3-1985 to 31-12-1986. It is also alleged by the plaintiffs that the defendant no.1 is not using the suit premises and is not residing in Ahmedabad city and is not paying the rent of the suit premises to the plaintiff and she has become tenant in arrears of rent. The defendant no.1 has sublet the suit premises to the defendant no.2 and the defendant no. 1 is getting profit by taking rent from the defendant no. 2. Hence, the plaintiffs served the notice to the defendant no. 2 to get possession of the suit premises by terminating tenancy of the defendants. The copy of the notice was also sent to the defendant no.1 and the said notice was given by the plaintiffs and the sons of the defendant no.1 came to the plaintiffs and agreed to hand over the possession of the suit premises by asking money but thereafter they demanded very big amount from the plaintiffs which was not bearable by the plaintiffs and again the plaintiffs served the notice dated 12-11-1986 to the defendants for possession by terminating the tenancy and the said notice was not

served on the defendant no. 1 as she was not residing in the suit premises and the notice was served on the defendant no. 1 at the address of Bombay but the defendant no. 1 did not reply to the said notice and hence the plaintiffs have filed the present suit to recover the rent, mesne profit and for getting possession of the suit premises. It is also asserted by the plaintiffs that the defendant no. 1 has sublet two rooms of the suit premises to her relative Gitaben Shashikant Tripathi - defendant no. 2 and the defendant no. 1 is taking rent of Rs.150/- p.m. from the defendant no. 2. According to the plaintiffs, the defendant no. 2 has got her own house in Ahmedabad city and she is also residing there for long time and at present the defendant no. 2 has locked the suit premises and the defendant no. 2 is residing with her husband in their own house. Hence, tenancy of the defendant no. 1 deserves to be terminated and the plaintiffs are entitled to get vacant and peaceful possession of the suit premises. The plaintiffs are residing with their family in one rented premises at the rate of Rs.12/- p.m. in Shahpur area of Ahmedabad. The said room is admeasuring 10 feet x 12 feet having no facility for 10 members of the family of the petitioners. Hence, the petitioners are facing great inconvenience in the said rented room and the suit premises is reasonably and bonafidely required by the plaintiffs for personal occupation. The plaintiffs claimed for vacation of the suit premises and peaceful possession of the suit premises and also claimed arrears of rent of Rs.537-50 for the period from 15-3-85 to 31-12-1986 i.e. for 21 months and 15 days and also mesne profits and also prayed for to hand over the actual and vacant possession of the rooms situated on the first floor by opening lock. The plaintiffs have also prayed for mesne profits at the rate of Rs.25/- p.m. from 1-1-1987 till the date on which the possession of the suit premises is given to the plaintiffs. The plaintiffs have also prayed for damages caused to the premises and Rs.100/for notice charges.

#. The defendants have filed their statement and have strongly resisted the suit contending that the suit of the plaintiffs is not legal one and no cause of action has arisen for them to file such suit and the suit is bad in law. The suit has been filed only with an intention to get more rent from the defendants and hence the same deserves to be dismissed with costs.

#. The trial court after going through the evidence on record held that the defendants are in arrears of rent as alleged. It has also been held by the trial Court that the defendant no. 1 has unlawfully sublet the suit

premises or assigned or transferred the same in other manner her interest therein as alleged. It is also further held by the trial Court that the defendant no. 1 is not using the suit premises without reasonable cause for the purpose for which it was let out for a continuous period of six months immediately preceding the date of the suit. The trial Court by the judgment and order dated 31-1-1992 decreed the suit for arrears of rent of Rs.537-50 ps. and for possession of the suit premises and with costs against the defendants no. 1 and 2. However, the suit of the plaintiff for possession of the room situated on the first floor of the suit premises was dismissed. The defendant no. 1 was directed to pay Rs.537-50 ps. to the plaintiff as arrears of rent due from 31-1-1992 and to continue to pay regularly Rs.25/p.m. to the plaintiff as future arrears of rent for the mesne profits due from 1-2-1992 till the possession of the suit premises is handed over to the plaintiffs. The standard rent of the suit premises was fixed at Rs.25/p.m.

#. The defendants being aggrieved with the aforesaid judgment and decree of the trial Court filed Civil Appeal No. 44/92 before the Appellate Bench of the Small Causes Court, Ahmedabad. After hearing the parties, the appellate Court framed following four issues for determination :

- (i) Whether the learned trial Judge has erred
in holding that the appellant no. 1 -
defendant no. 1 is not entitled for any
protection under Section 12 of the
Bombay Rent Act ?
- (ii) Whether the learned trial Judge has erred
in coming to the conclusion that the
appellant no. 1 - defendant no. 1 has
unlawfully sublet the whole or part of
the suit premises or assigned or
transferred the same to appellant no.2
defendant no. 2 ?
- (iii) Whether the learned trial Judge has erred
in coming to the conclusion that the
suit premises is not used by the
appellant No. 1 - defendant no. 1
without reasonable cause for the purpose
for which it was let for a continuous
period of six months immediately
preceding the the date of the suit ?

(iv) Whether the learned learned trial Judge
has erred in passing a decree of eviction
in the suit against the appellant
defendant ?

#. The lower appellate Court after going thoroughly
the evidence on record and after reevaluating the entire
the evidence came to the conclusion regarding the point
no. 1 that the defendant no. 1 has deposited the full
amount of rent in the Court and hence she is protected
from eviction decree u/s 12 (3) (b) of the Bombay Rent
Act. Regarding points no. 2 and 3 the lower appellate
Court came to the conclusion that the second ground which
is quite separate from Section 13 (1) (k) of the Bombay
Rent Act, is the ground under Section 13 (1) (e) of the
Bombay Rent Act and while considering the case of the
respondents - landlords under Section 13 (1) (e) of the
Bombay Rent Act, the appellant no. 2 who is the daughter
of appellant No. 1 and who is married and having a big
house of her in-laws in the city of Ahmedabad, cannot be
said to be member of the family and even if she is
considered to be a member of the family, then in that
case also, when the defendant no. 1 is alive and
residing elsewhere no claim under any of the provisions
of the Act can be made by her and simpliciter she is the
illegal transferee of the suit premises.

#. Heard learned counsel for the parties and perused
the relevant papers on record. Learned counsel for the
petitioner contended that the property in dispute was
purchased by the respondents on 15-3-1985. Even if it is
assumed that the petitioners were in illegal transferees
then also the previous landlord has not raised any
objection or has not taken any action regarding
subletting or illegal transfer. That ground was
available to the old owner landlord and not new landlord.
Hence, no cause of action has arisen and the cause of
action arisen to the old landlord cannot be said to have
arisen and available to the new landlord and it will be
deemed that the old landlord has waived right for taking
any action regarding sub-tenancy to the respondent no.
2. That ground is not available to the present
respondents - present landlord. It is further argued
that on the ground of subletting the suit was filed. But
the lower appellate Court has erred in decreeing the suit
holding that the suit property was not sublet but
unlawful possession was transferred. In case,
sub-tenancy is not proved the Courts below have committed
an error in assuming that the ground of illegal transfer
of tenancy is also available to the plaintiffs though not
pleaded. Learned counsel for the petitioners has

referred certain documents i.e. the letters and ration card etc. to show continuity of the possession of the petitioners. During pendency of the appeal, the respondent no.1 died and the petitioners are heirs and legal representatives of the deceased appellant no. 1. Learned counsel for the petitioner has relied on the proviso to Section 109 of the Transfer of Properties Act, wherein the transferee is not entitled to the arrears of rent due before transfer, and that, if the lessee, not having reason to believe that such transfer has been made, pays rent to the lessor, the lessee shall not be liable to pay such rent over again to the transferee. He has also relied on the commentary in respect of Section 112 of the Transfer of Property Act in which the principle of waiver has been considered. Waiver is enjoyment or advantage, claim or benefit or privilege, which accepts for such waiver would have enjoyed. Such waiver arises when the landlord waives his right to take possession even after breach of certain terms and conditions of the lease deed, which provided that the tenant forfeits his right to hold such property. Justice Madholkar held some delay in doing a particular act in raising a particular objection would not of its justified and doubtless of waiver.

#. On the contrary, the learned counsel for the respondents contended that the question of waiver has been argued for the first time in this Court. That question was not raised either before the lower Court or before the appellate Court. Therefore, it would not be proper for this Court to entertain the arguments regarding waiver in this Court in the revisional jurisdiction and secondly, on the basis of the evidence two views are available and out of them one view has been taken on the basis of the appreciation of the evidence by the lower appellate Court. This Court should not take different view from the view taken by the lower appellate Court unless the findings are totally perverse and no prudent man could reach at the conclusion arrived at by the lower appellate Court. He relied on the decision of the Apex Court in the case of Helper Girdharbhai Vs. Saiyed Mohamad Mirasaheb Kadri and others, reported in AIR 1987 SC 1782, wherein it has been held as under :-

"In exercising revisional power under Section 29

(2) the High Court must ensure that the principles of law have been correctly borne in mind by the lower Court. Secondly, the facts have been properly appreciated and a decision arrived at taking all material and relevant facts in mind. In order to warrant interference, the

decision must be such a decision which no reasonable man could have arrived at. Lastly, such a decision does not lead to a miscarriage of justice. But in the guise of revision substitution of one view where two views are possible and the Court of Small Causes has taken a particular view, is not permissible. If a possible view has been taken, the High Court would be exceeding its jurisdiction if it substitutes its own view in place of that of the Courts below because it considers it to be a better view. The fact that the High Court would have taken a different view is wholly irrelevant.

#. Regarding the question raised by the learned counsel for the respondents that the petitioner plaintiff pleaded that the defendant no. 1 has sublet the suit premises to the defendant no. 2 and the subletting is not proved then the Court will not presume illegal transfer of sub-tenancy. Learned counsel for the respondents contended that transfer in any other manner would include the transfer made in favour of the relative or known person. If he has left the premises and transferee is put in exclusive possession even then sub-tenancy is not proved. The plaintiff is required to prove that transfer has been made in favour of the relative and that person has been put in the exclusive possession and the learned counsel for the respondent has relied on the decision of this Court in the case of Harshadchandra Narshibhai Patel and others Vs. Ibrahim Haji, reported in 1984 G.L.H. 965, wherein it has been held as under :-

"Section 13 (1) (e) of the Rent Act is much wider and it is not confined merely to the acts of unlawful subletting. I also provide that if a tenant has assigned or transferred in any other manner his interest in the premises taken on lease by him, then also the landlord will become entitled to a decree for possession of the said premises. The words "transfer in any other manner" are much wider and would include within their meaning and ambit a transfer made in favour of a relative or a known person, once it is proved that he has left the premises and the transferee is put in exclusive possession. To give these words a restricted meaning and equate such a transfer with subletting is to make that part of the subsection redundant. The facts of this case clearly show that defendant no. 1 had

transferred his interest in the suit premises to defendant no. 2. If it is found that the premises were transferred for valuable consideration, then it will certainly amount to subletting. Even if it is not possible to come to that conclusion, then also it amounts to a transfer in any other manner.

Section 13 (1) (e) of the Act is much

wider. It is not confined merely to the acts of unlawful subletting. The words "transfer in any other manner" would include a transfer made in favour of a relative or a known person, once it is proved that he has left the premises and the transferee is put in exclusive possession. To give these words a restricted meaning and equate such a transfer with subletting is to make that part redundant. If it is found that premises were transferred for valuable consideration then it will amount to subletting. If it is not possible to come to that conclusion, then also it amounts to a transfer in any other manner."

##. I have considered the submissions made on behalf of the parties and perused the material on record. Both the Courts have recorded the findings regarding nonuser of the property by the petitioners. The contention of the learned counsel for the respondents has force that the defendant no. 1 to whom the property was let out by the plaintiff - old landlord. The notice was served on the defendant at her Bombay address. In that notice an endorsement was found that not known and she was not available at the suit premises. The petitioner went to her in-laws house after her marriage and she stayed there for 5-6 months. Therefore, she has her in-law's house in the same city near the suit premises. The findings arrive at by the Courts below that the property was not used by the defendant no.1 does not appear to be unjustified or illegal on the basis of the evidence on record. Learned counsel for the petitioners raised the question that the old landlord has not objected or taken any action in respect of sub-tenancy. In case, old landlord has not taken any action or the new landlord has taken action, cannot be said to be unjustified on the ground of delay. That ground is available to the subsequent owner i.e. new owner. Moreover, the findings recorded by the Courts below with regard to subletting from the date of purchase. Hence, the cause of action arose after purchase of the suit property is fully justified and the Courts below have not committed any

error. In this respect also this point has not been raised and cause of action continues in the same nature and that can be raised at any stage. If the old landlord has not objected or has not taken any action but the same ground will remain continue for the new landlord to take necessary action. Thus, the principle of waiver is not available in the present case. This Court has also held that illegal transfer of tenancy to third person will also cover subtenancy. Even the case of subtenancy is not made out, the Courts below are justified in decreeing the suit and in holding that possession of the property was unlawfully transferred by the defendant no. 1.

##. Considering the facts and circumstances of the case, the scope of this Court is very limited. Reappreciation of the evidence is not available to this Court in the revisional jurisdiction. On the basis of same evidence, this Court cannot reevaluate the evidence and come to a different finding in the revisional jurisdiction. Particularly, the letters, ration card etc. which were referred by the learned counsel for the petitioner in coming to a different view have not been considered by the Courts below. Even those documents have been wrongly or rightly appreciated, accepted or rejected by the Courts below, this Court will not reevaluate the same as reappreciation of the evidence is not permissible under the law to this Court in the revisional jurisdiction. At the most on the basis of the reappreciation of the evidence, this Court can reach at two possible conclusions after going through the record. The Courts below have recorded the findings on the basis of evidence on record and hence this Court cannot take different view only on the basis of reevaluation of the same evidence.

##. Considering the facts and circumstances of the case and contentions raised by the learned counsel for the parties, this revision application is liable to be dismissed and accordingly this Revision Application is dismissed.

##. Learned counsel for the petitioner submitted that the petitioner may not be dispossessed and requested to grant one year's time to vacate the suit premises. In the facts and circumstances of the case, three months' time is granted to the petitioner to vacate the suit premises and the petitioner shall vacate the suit premises within three months and shall give an undertaking that within the period of three months he will not assign, transfer or alienate the suit premises in any manner whatsoever to any person and he will vacate

the suit premises and will hand over calm, peaceful and vacant possession of the suit premises to the respondents.

-0-0-0-0-0-